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In the Supreme Court of the United States

October Term, [redacted] 1970

No. 625

ROBERT C. BIRMELIN,

Petitioner,

vs.

RAY BOYMER and MARY BOYMER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

HAROLD MENDELOW,
Member of the Bar of
The United States
Supreme Court.
c/o
DAVID F. CERF, JR.,
Attorney at Law
803 Biscayne Building
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

October Term, 1969

No. _____

ROBERT C. BIRMELIN,

Petitioner,

vs.

RAY BOYMER and MARY BOYMER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner, ROBERT C. BIRMELIN, prays that a WRIT OF CERTIORARI issue to review the Judgment of the District Court of Appeal of Florida, Third District, entered in Case No. 68-913 on October 21, 1969. Petition for Rehearing was denied by Order entered November 7, 1969.

CITATIONS TO OPINIONS BELOW

The trial of the above case was held in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Case No. 67-18117 (Honorable Henry L. Balaban, Circuit Judge).

The Final Judgment in favor of the Petitioner is unreported and appears in Appendix "C" attached hereto on Page App. 7. The Opinion of the District Court of Appeal of Florida Third District sought to be reviewed herein is reported in 227 So.2d 358 and appears in Appendix "E" attached hereto on Pages App. 23-33. The denial of rehearing of same appears in Appendix "H" attached hereto on Page App. 41.

The denial of petition for a writ of certiorari entered by the Florida Supreme Court is unreported and appears in Appendix "K" attached hereto on Page App. 59. The denial of rehearing of same is unreported and appears in Appendix "M" attached on Page App. 63.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) in that the Petitioner seeks review of a decision of the highest Court of a State in which a decision could be had where a right and privilege was specially set up or claimed under the Constitution of the United States.

The opinion sought to be reviewed was filed October 21, 1969 (App. 23) and rehearing was denied on November 7, 1969 (App. 41). A Petition for a Writ of Certiorari

to the Florida Supreme Court in Case No. 39,226 was denied on March 16, 1970 (App. 61) and rehearing was denied on April 6, 1970 (App. 63). The Application of the Petitioner for an extension of time in which to file a Petition for a Writ of Certiorari in the United States Supreme Court was granted on June 4, 1970, by Mr. Justice Black and extended the time to and including September 3, 1970. (App. 65).

FEDERAL QUESTION PRESENTED

WHETHER THE FOURTEENTH AMENDMENT CONSTITUTIONAL PROTECTIONS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW ARE APPLICABLE TO CIVIL APPEALS IN STATE COURTS WHEREIN AN ATTORNEY AT LAW IS A PARTY TO THE APPEAL.

CONSTITUTIONAL PROVISIONS INVOLVED

"ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. CONSTITUTION, AMENDMENT XIV, VOL. 1 U.S.C. Page XLVII (1964 Edition).

STATEMENT

The symbol "App." will be used to denote any references to the Appendix attached hereto. The symbols "TC" will be used to denote any references to the certified copy of the Trial Court record furnished by separate cover by the Clerk of the Circuit Court of the Eleventh Judicial Circuit Court in and for Dade County, in Case No. 67-18117. The symbols "AC" will be used to denote any references to the certified copy of the Appellate Court record furnished by separate cover by the Clerk of the District Court of Appeal of Florida Third District in Case No. 68-913. The symbols "SC" will be used to denote any references to the certified copy of the Supreme Court of Florida record furnished by separate cover in Case No. 39,226.

The Petitioner, ROBERT C. BIRMELIN, is an Attorney at Law and a long-time friend of the Respondents, RAY BOYMER and MARY BOYMER. (TC-11,12). In 1958, the Petitioner acted as servicing agent for a corporate loan payable to the Respondents and was paid the sum of One ($1.00) Dollar, or less, a month for his services. (TC 30).

The loan was paid on a regular basis until 1961 at which time the corporation was unable to make further payments. (TC 75). The Petitioner told the Respondents that the note was uncollectible and the Respondents sought the advice of another attorney. (TC 100,101). The attorney was advised by the Petitioner to file suit but suit was never filed. (TC 50).

In 1962, the Respondents were in serious financial trouble and sought help from the Petitioner. (TC 93). The

Petitioner stated that he might be able to exert his personal influence on the defunct corporation's President. His plan was to give the Respondents a note which was to be paid out of monies collected from the defunct corporation. (TC 53,68,72).

This note was not to be a personal obligation of the Petitioner and was only given because the Petitioner felt a moral obligation to the Respondents due to their long friendship. (TC 43-45, 70-74). The Petitioner was unable to collect any monies to make payments on the note. (TC 48).

The Petitioner was sued by the Respondents in 1967. They alleged that he did not pay the note when due. The Petitioner raised the defense of lack of consideration. The Trial Judge heard the conflicting testimony of the parties and ruled in favor of the Petitioner on his defense of lack of consideration. (App. 7). The Respondents appealed and the District Court of Appeal reversed the findings of the Trial Judge on three grounds:

The State Appellate Court stated that in their own view of the record that the Petitioner had failed to prove his defense of lack of consideration by prepondérance of the evidence. (App. 31, AC 77).

The State Appellate Court stated that they refused to accept as credible the testimony of the Petitioner. (App. 32, AC 78).

The State Appellate Court stated that they carefully scrutinized the Petitioner's testimony because he was an Attorney at Law. (App. 31, AC 78).

The State Appellate Court applied these three standards in spite of the fact that the Petitioner expressly set forth in his brief as appellee that the weight of the evidence and the credibility of witnesses was solely in the province of the Trial Judge and that his testimony as an Attorney at Law was just as valid as a layman's.

The Petitioner initially rejected the weight of the evidence contention on Page 3 of his brief of Appellee (App. 12, AC 44). He correctly stated and specially set forth on Page 4 of his brief that the correct settled principle of appellate law was whether or not there was any evidence in the Trial Court record to sustain the Trial Judge (App. 14, AC 45).

The Petitioner rejected the contention that the credibility of witnesses was for the Appellate Court on Page 9 of his brief. (App. 20, AC 50). He correctly stated on the same page that the settled principle of appellate law that the credibility of witnesses is for the Trial Court.

The Petitioner rejected the contention that his testimony as an attorney should be closely scrutinized on Page 9 of his brief. (App. 20, AC 50). He correctly stated on the same page the settled principle of appellate law that the attorney-client relationship did not affect the right of the Trial Court to believe him.

The Petitioner then filed a petition for rehearing in the Appellate Court and stated that the Court had made a complete and unique departure from virtually every settled principle of appellate law when it rendered its opinion and asked the Appellate Court to certify its decision as one of great public importance to the Florida Supreme Court. (App. 33-37, AC 80-84).

The Petitioner stated:

"... An Appellate Court may not properly re-assess the evidence or substitute its judgment concerning the credibility of witnesses or the record as a whole for that of the finder of fact ....." (App. 33, AC 80).

The Petitioner stated:

"..... the Court has overlooked or failed to consider the myriad of cases which hold that lawyers are not second class citizens before trial or appellate courts ....." (App. 36, AC 82).

The Petitioner stated that the issues involved:

"..... serious and important questions concerning the obligations of attorneys and the standards to be applied in assessing their rights as litigants in the trial and appellate courts of our State." (App. 39, AC 84).

The Petitioner then filed a Petition for Certiorari in the Florida Supreme Court to review the opinion of the Appellate Court.

His petition stated that:

"..... an Appellate Court may not properly re-assess the evidence or substitute its independent judgment concerning the credibility of witnesses for that of the Trial Judge". (App. 46, SC Item 1, Page 4). And on the same page that:

"..... identical rules of appellate review apply to cases in which lawyers are involved. ....."

The petition was denied and the Petitioner then requested a rehearing and stated that:

". . . . . the Court overlooked or failed to consider the fact that the District Court substituted its judgment as to the credibility of the witnesses and the weight of the evidence for that of the trial judge . . . ." (App. 61, SC Item 7, Page 1).

". . . . . the Court overlooked or failed to consider the fact that the District Court apparently held that the ordinary rules of appellate review of findings of fact by the Trial Judge do not apply because the transaction involved the attorney-client relationship . . . . ." (App. 61, SC Item 7, Pages 1 and 2).

REASONS FOR GRANTING THE WRIT

The reasons for granting this Writ are to be found in the due process of law and equal protection of the laws provisions of the Fourteenth Amendment to the United States Constitution. Certainly these provisions guarantee that all persons are entitled to have settled principles of appellate law applied to their appeals in the State Courts without discrimination:

> There are certain settled principles of appellate law which are so basic to our system of jurisprudence that they hardly need citation. These are that the weight to be given evidence and the credibility of witnesses are solely within the province of the Trial Court. *McCaughn* v. *Real Estate Land Title and Trust Co.* 297 U.S. 606, 56 S.Ct. 604, 80 L.Ed. 879 (1936); *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946).

The State Appellate Court did not apply these principles of appellate law. The Court, in fact, did weigh the evidence and judge the credibility of witnesses.

The State Court had to weigh the evidence when they held that the Petitioner did not meet his burden of proof by the greater *weight* or preponderance of the evidence. The Appellate Court function is not to see *how much* evidence there is to support the findings of the Trial Court, it is to see if there is *any* evidence to support the Trial Court. *McCaughn, supra*. See Also, *Goldfarb* v. *Robertson* 82 So.2d 504 (Fla. 1955).

There, in fact, was an abundance of substantial evidence to support the finding of the Trial Judge. The testimony of the Petitioner and the circumstances of long friendship and less than One ($1.00) Dollar per month servicing agent fee fully support the defense of lack of consideration.

The State Appellate Court had to judge the credibility of the witnesses when they rejected the testimony of the Petitioner. The Trial Court believed the Petitioner and disbelieved the Respondents. This was the Trial Court's sole and exclusive province. *Lavender, supra*. See also *Mese* v. *Dade Tire Company*, 95 So.2d 587 (Fla.1957).

The State Appellate Court did not have any right to reject the "contention" of the Petitioner and take their "own view" of the record. One has only to read the real record and see the straight-forward testimony of the Petitioner compared to the evasive testimony of the Respondents to see why the Trial Judge believed the Petitioner. (See TC 102-103).

This Court has long ago firmly established that there can be no valid reason to disregard settled principles of law. This was in the case of *Buchanan* v. *Litchfield*, 102 U.S. 278, 27 L.Ed. 138 (1880). The facts of that case are very similar to the instant case. It appears that the City of Litchfield was sued on an obligation and raised the defense that it was unenforceable and won. This Court reviewed all aspects of the case and stated:

> "Waiving all considerations of the case in its moral aspects, it is only necessary to say that the *settled principles of law cannot with safety to the public be disregarded* in order to remedy the hardships of special cases. (Id 102 U.S. at 293)".

This Court has also long ago held that due process and equal protection of the law apply to State Appellate Courts. *Griffen* v. *People of the State of Illinois*, 351 U.S. 12, 70 S.Ct. 585, 55 A.L.R. 2d 1055, 100 L.Ed. 891 (1956). This Court noted in *Griffen*, *supra*, that providing equal justice is an age-old problem and cited the Holy Bible in footnote ten (10) of the opinion. Certainly the rights that this Court gave to criminals in Griffen, supra, should also apply to attorneys at law such as the Petitioner. *L. W. Holt* v. *Commonwealth of Virginia*, 381 U.S. 131; 85 S.Ct. 1375, 14 L.Ed. 290 (1965).

There can be no doubt that the State Appellate Court discriminated against the Petitioner in this case because he was an attorney. They said so in their opinion when they stated they would "carefully scrutinize" the testimony of the Petitioner. It may very well be that for moral reasons the State Appellate Judges disregarded every settled principle of appellate review because the Petitioner was an attorney but they did not have the right to do so. *Buchanan*, supra.

The Petitioner was punished by the State Appellate Judges because he was an attorney. This discrimination and violation of due process cannot and must not withstand constitutional attack if the public is to be safe within our system of jurisprudence. *Buchanan*, supra.

Judges violating settled principles of law is an age-old problem. We find the Apostle Paul being brought before some Judges who could not punish him under the settled principles of law that existed in his day and time:

> "1. And Paul earnestly beholding the council said, Men and brethren, I have lived in good conscience before God until this day.
>
> 2. And the High Priest, An-a-ni-as commanded them that stood by him to smite him on the mouth.
>
> 3. Then said Paul unto him, God shall smite thee thou whited wall; for sittest thou to judge me after the law, and commandest me to be smitten contrary to the law," Holy Bible Acts 23.

The Petitioner now stands before this Court and appeals to it as Paul appealed to God. He is an attorney at law and just wants to be given the same rights as other people in appellate courts.

This Court has jealously protected the rights of attorneys in the past. *L. W. Holt*, supra, *Spevak* v. *Klein*, 385 U.S. 511, 87 S.Ct. 625 17 L.Ed. 2d 574 (1967); *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 20 L.Ed. 2d 874 (1968). The Petitioner prays that the Court will once again protect the rights of all attorneys and the public to fair appellate review.

CONCLUSION

For the foregoing reasons, this Petition for a WRIT OF CERTIORARI should be GRANTED.

Respectfully submitted this _____ day of August, 1970.

_____

CERTIFICATE OF SERVICE

I, HAROLD MENDELOW, c/o DAVID F. CERF, JR., 803 Biscayne Building, Miami, Florida 33130, DO HEREBY CERTIFY that on this 29 day of August, 1970, a copy of the foregoing PETITION FOR WRIT OF CERTIORARI in the above styled case was served on HENDRICKS & HENDRICKS, Attorneys for Respondents, 1441 S. W. 1st Street, Miami, Florida, by mailing same in a duly addressed envelope to them postage prepaid.

/s/ Harold Mendelow

HAROLD MENDELOW,
Member of the Bar of
The United States
Supreme Court,

c/o

DAVID F. CERF, JR.,
Attorney at Law
803 Biscayne Building
Miami, Florida 33130

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APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

NO. 67-18117

[TITLE OMITTED]

COMPLAINT

Plaintiffs, RAY BOYMER and MARY BOYMER, his wife, sue Defendant, ROBERT C. BIRMELIN, and allege:

1. This is an action for damages which exceeds the sum of FIVE THOUSAND and 00 100 ($5,000.00) DOLLARS, the jurisdictional amount of this Court.

2. On February 27, 1962, Defendant executed and delivered to Plaintiffs, a Promissory Note, in Dade County, Florida, a copy of said Promissory Note being attached hereto as Plaintiff's Exhibit "A".

3. Defendant failed to pay said note when due.

4. There is now due, owing and unpaid from Defendant to Plaintiffs, TEN THOUSAND and 00 100 ($10,000.00) DOLLARS on said note with interest from date of February 27, 1962.

5. Plaintiffs have obligated themselves to pay their attorneys a reasonable fee for his services in bringing this action.

HENDRICKS & HENDRICKS

By _____
B. E. HENDRICKS

Attorneys for Plaintiffs
1441 Southwest 1st St.,
Miami, Florida 33135.

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CIVIL ACTION NO. 67-18117 (BALABAN)

[TITLE OMITTED]

ANSWER

Comes now the Defendant, ROBERT C. BIRMELIN, and in answer to the above styled cause states under oath the following:

1. The defendant is without knowledge as to Plaintiffs allegation number 1.

2. The Defendant admits the execution of a Promissory Note as described in Plaintiffs allegation numbered 2, but denies any consideration was given or delivered by the Plaintiffs or any one else to the Defendant, as more fully set forth in the Affirmative Defense, which Affirmative Defense is adopted as a part of the answer to this paragraph and this cause.

3. The Defendant admits Plaintiffs allegation numbered 3.

4. The Defendant denies Plaintiffs allegation numbered 4.

5. The Defendant is without knowledge as to Plaintiffs allegation numbered 5.

6. As an Affirmative Defense the Defendant denies that any consideration was given by the Plaintiffs to the Defendant and as further proof of facts thereof the Defendant states:

A. That the Plaintiffs did invest the sum of $11,000, through the Defendant as Plaintiffs agent in Central Insurance Agency, Inc., a Florida Corporation on October 22, 1958, this said investment represented by a Promissory Note which is still in the possession of the Plaintiffs, and as a result of this investment the Plaintiffs did in fact receive more than $5,000 from the period October 22, 1958 through October 16, 1961, after which time Central Insurance Agency, Inc. was unable to make any further payments.

B. That the Defendant agreed with the Plaintiffs to attempt to collect any assets the Defendant could from Central Insurance Agency, Inc. to pay off the balance of any funds still owed to the Plaintiffs by Central Insurance Agency, Inc. and in good faith thereof the Defendant executed a $10,000 Promissory Note to the Plaintiffs but received no consideration from the Plaintiffs at the time of the execution of this note or any time thereafter.

The Defendant therefore believes that he has stated sufficient facts under oath to directly, positively and unequivocally set forth the Affirmative Defense of total lack of consideration and thereby places the burden on the Plaintiffs to prove consideration paid by the Plaintiffs to the Defendant and if such consideration is not proved that this cause be dismissed with prejudice.

s/ Robert C. Birmelin

ROBERT C. BIRMELIN
Defendant
904 Biscayne Building
Miami, Florida 33130

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, the undersigned authority, this day personally appeared ROBERT C. BIRMELIN, the Defendant in the above styled cause, and after being duly sworn, deposes and says that he has read the foregoing Answer before signing and the facts therein contained are true to the best of his knowledge.

/s/ Robert C. Birmelin

ROBERT C. BIRMELIN

SWORN TO and SUBSCRIBED before me, this.____ day of December, 1967 at Miami, Dade County, Florida.

Notary Public, State of Florida

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY CIVIL

No. 67-18117 (Balaban)

[TITLE OMITTED]

FINAL JUDGMENT

THIS CAUSE came before the Court for trial without a jury after formal notice of same, and all parties being present and represented at the trial, and after hearing argument of counsel, examining the exhibits and hearing testimony of the witnesses, and reviewing the evidence, and having fully considered the matter in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. That a final judgment be, and the same is hereby entered for the defendant, and that the plaintiffs shall take nothing by this suit as to this defendant, and that this defendant shall go hence without day.

2. That the defendant shall recover costs to be hereinafter assessed, and for which sum let execution issue according to law.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 27th day of September, 1968.

HENRY L. BALABAN
Circuit Judge

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 68-913

[TITLE OMITTED]

BRIEF OF APPELLEE

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AUTHORITIES CITED

2 Fla.Jur., Appeals, §304

2 Fla.Jur., Appeals, §346, p. 722

4 Fla.Jur., Bills, Notes and Checks, §56, p. 386

7 Fla.Jur., Contracts, §52, p. 107

11 Am.Jur.2d., Bills and Notes, §219, p. 247

I.

STATEMENT OF THE CASE

This is an appeal from a final judgment entered, after a non-jury trial, in favor of the defendant in an action upon a promissory note. The answer of the defendant-appellee, Robert C. Birmelin, a Miami attorney, admitted execution and delivery of the $10,000.00 note in question to the plaintiffs-appellants, Ray Boymer and Mary Boymer, and pleaded the affirmative defense of lack of

consideration (R. 3-5). After a trial at which the only witnesses were the defendant, Mr. Birmelin, and Mr. Boymer, the trial judge, sitting as the trier of fact, entered a simple judgment for the defendant, which obviously reflected his acceptance of the affirmative defense, and, necessarily, his resolution of the conflicts in the testimony in favor of the defendant. (R. 173)

The defendant, Mr. Birmelin, had been a longtime friend of the plaintiffs prior to his admission to the Bar in 1952 (R. 11-12); after that time he represented them as an attorney in various transactions (R. 14). In 1958, the Boymers, who had sold their charter boat, invested much of the proceeds in four loans in the total amount of $17,110.00 (R. 23). Birmelin acted as "servicing agent" for the Boymers in the collection of the loans which were made payable to him, as Trustee. Three of the obligations were collected and paid in full; on the fourth note, an $11,000.00 corporate note made payable to Mr. Birmelin, as Trustee, by the Central Insurance Agency, Inc., payments were made from 1958 to 1961 (R. 37). At that time the Central Insurance Agency became unable to make further payments. Birmelin had represented Central Insurance and had recommended the investment to the Boymers; he had, however, no interest in the company and gained no personal benefit (apart from a $1.00 per month servicing fee) whatever from the loan (see R. 30). An attorney, acting on the Boymers' behalf, had called Birmelin asking about the status of the notes in late 1961 (R. 50). Birmelin stated that Boymer could "file suit" if he cared to, on the Central Insurance Agency note (R. 50).

R— Record.

In February 1962, the note upon which this suit was based was executed by Birmelin. The circumstances under which this occurred were the subject of substantial dispute between Birmelin and Boymer at the trial. Boymer stated that the note was signed by Birmelin after Boymer had said that if Birmelin could give him no satisfaction concerning the payments which had not been made, he would "go before the Bar Association" (R. 94). Birmelin, on the other hand, in testimony which was obviously accepted by the trial judge, stated that he had executed the note purely out of a sense of moral obligation to the Boymers and a desire that they should not lose money as a result of the investment in which he had played a part. (See, e.g., R. 43-46; 70-72). He had stated that the note did not represent a personal obligation of his but that it would be employed in a rather quixotic, and what turned out to be an unsuccessful attempt, to secure the money from the Central Insurance Agency (R. 45). Birmelin's account of the events did not, of course, include any reference to Boymer's threat "to go to the Bar Association"; and neither Boymer's nor Birmelin's included any reference to an agreement of Boymer to refrain from an action on the note or one against the defendant himself, in return for Birmelin's signature.

Based upon the testimony of Birmelin and Boymer, the trial judge entered judgment for the defendant which, again, clearly represented a finding for him on the only issue in dispute — that of lack of consideration for the promissory note which had been admittedly signed and executed. The plaintiffs have appealed to this Court from the adverse final judgment.

II.

POINT INVOLVED

The appellants have ostensibly raised two points on appeal. The first merely claims that, in an action of this kind, the burden is on the defendant-maker of a note to establish by a preponderance of the evidence, an affirmative defense of lack of consideration. There is, however, no issue between the parties concerning this contention, and no showing that the trial judge, whose judgment is presumed to have been based upon the rule which the appellants correctly state, did not follow it. See COHEN v. MOHAWK, INC., Fla., 1962, 137 So.2d 222, 225; 2 Fla. Jur., Appeals, §304. Thus, the only issue actually involved in this appeal is —

> WHETHER THERE IS EVIDENCE IN THE RECORD UPON WHICH THE TRIAL JUDGE COULD PROPERLY HAVE FOUND THAT THE NOTE SUED UPON WAS NOT ENFORCEABLE FOR LACK OF CONSIDERATION.

The appellee contends that the record amply supports the trial judge's resolution of the issue both as a matter of fact and of law, and that the judgment should therefore be affirmed.

III.

ARGUMENT

It is, of course, axiomatic that the judgment of a trial judge sitting as the trier of fact is presumably correct, and that all "appellate courts should interpret the evidence

and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to [his] conclusions." 2 Fla.Jur., Appeals, §346, p. 722; e.g., CHAKFORD v. STRUM, Fla. 1956, 87 So.2d 419. The sole issue, therefore, is whether, as a matter of law, the trial judge could have found from the evidence — as he obviously did — that the note was given without consideration and hence could not have been enforced. The record is replete with such evidence.

The Birmelin, who the trial judge had the eminent right to believe, stated categorically that the note was given, not in order to induce forbearance on the part of Boymer from suing or proceeding through the Bar Association against him — but purely out of a voluntary sense of personal obligation and a desire that his longtime friends should not lose part of their investment. The note was to be no more than a means by which Birmelin would attempt to secure the money owed by Central Insurance. Indeed, he testified that he accepted the Boymers' word that the amount of the note, $10,000.00, remained outstanding on the Central Insurance obligation, even though the fact of the matter was that the plaintiffs had received over $9,400.00 in principal and interest upon the $11,000.00 note (R. 58-59). The defendant testified as follows concerning the circumstances surrounding, and his reasons for signing, his personal note to the plaintiffs:

> "... what were the circumstances surrounding the giving of this note by you to Mr. and Mrs. Boymer?
>
> "A. What date are you referring to?

"THE COURT: February 27, 1962.

BY MR. HENDRICKS:

"Q. This note that's being sued on.

"A. Yes, sir. My recollection was that Ray called me up. We had lunch together. He said the amount of money he thought he had invested in the company and I said, "Well, I will do everything I can to try to collect the funds, Ray, for you and as evidence of good faith, I will execute a note."

"THE COURT: As what?

"THE WITNESS: "I will execute a note."

"MR. HENDRICKS: As evidence of good faith.

"THE WITNESS: "I will try to collect the money from Central Insurance Agency."

BY MR. HENDRICKS:

"Q. Why did you execute a note?

"A. I felt very concerned for Mary and Ray. I had been long-time friends for them. I felt a moral obligation to try to do whatever I could to see that any part of their investment was refunded, returned.

"Q. Did you represent to them that Central Insurance Agency was having difficulties and that this would give them more time?

"A. No, I don't believe so. I did represent that difficulties were being experienced at that time as a general condition throughout the country.

"Q. Did you prepare this note?

"A. Yes, sir. The note that you are referring to?

"Q. That's right.

"A. The one that I executed, yes, I did.

"Q. Did you tell Mr. Boymer that there was no consideration for the note and that you would not pay it?

"A. I told him whatever I collected from the company I would reimburse him on.

"Q. In other words, you were going to attempt to collect from the company and you were going to pay off this note from the company?

"A. That's correct.

"Q. Not from your own personal funds?

"A. No, never.

"Q. You didn't consider this to be a personal obligation to you at all?

"A. No, I did not.

"Q. And you explained all that very thoroughly and very fully to Mr. and Mrs. Boymer, to Mr. Boymer?

"A. We discussed it. I'm sure that we covered the point. I said whatever I could collect

from Central Insurance Agency would be given to him." (R. 43-45).

* * *

"THE COURT: Strike the word. Why did you sign this note?

"THE WITNESS: That's a good question, your Honor. My wife said the same thing.

"MR. HENDRICKS: I move to strike the statements, if the Court please. It is not responsive.

"THE COURT: Go ahead.

"THE WITNESS: Your Honor, I felt a moral obligation to Ray Boymer and his wife. I felt a very close kinship to them over a period of years. I didn't want to see that they would lose anything. Ray Boymer said that the obligation that was owed was $10,000. I didn't even question it. I just signed a note and said by virtue of signing this note I will try to get back to Shale and try to collect this money, and I assumed that was the basic balance of it at that time, and I did no checking and that was the second error that I did. The first error was signing the note and the second error was not checking on the proper balance.

* * *

"Q. Insofar as Central Insurance Company—

"THE COURT: Did they execute you to execute this note?

"THE WITNESS: No, sir.

"THE COURT: What did they say?

"THE WITNESS: They said they wanted to try to get back whatever they could. I said, 'Well, Ray and Mary, I will do whatever I can to see that that's done and as evidence of good faith, I will execute this note and will try to throw this down Shale's throat to see that we can get some money on it.'

BY MR. GOODMAN:

"Q. Why did you make that statement about throwing it down his throat? Did you feel by signing this note it would have any effect on Shale?

"A. Oh, yes, I certainly did.

"Q. What was that?

"A. Otherwise it was a corporate note, 15 per cent interest and there was no personal liability on it, and they could obtain a judgment against the company, but I felt that by exerting this influence we may be able to do something further on it." (R. 70-72).

There can be no question but that this version of the facts fully sustains the judgment on appeal. Needless to say, the promissory note, as between the immediate parties,

requires consideration for its enforcement: E.g., SINGLETARY v. SINGLETARY, 130 Fla. 347, 177 So. 546, And it is clear that the "moral obligation" which, Birmelin stated, was the sole inducement for the execution of the note, does not constitute the requisite consideration. 7 Fla.Jur., Contracts, §52, p. 107; 4 Fla.Jur., Bills, Notes and Checks, §56, p. 386. As is said in 11 Am.Jur.2d Bills and Notes, §219, p. 247:

> "As in regard to executory contracts generally, it is held that a mere moral obligation arising from ethical motives, or a mere conscientious duty, unconnected with any legal obligation, perfect or imperfect, or (under the later cases) with the receipt of benefit by the promisor of a material or pecuniary nature, will not furnish a consideration for a bill or note. Thus a moral obligation based on honor and dignity, past gratuitous or inadequately compensated services, services or support rendered to another person, or the debt of another, even though the other person is a relative, is not consideration."

Chief Judge William Howard Taft's statement in MORRIS v. NORTON, 6 Cir. 1896, 75 Fed. 912, 927, sums up the rule:

> ". . . Morris' sense of honor was not a valuable consideration. . ."

The appellants' brief is based essentially upon the claim that Birmelin's testimony should not have been believed by the trial judge, and that Boymer's story showed that there had been a valuable consideration—forbearance—upon which the note could have been enforced. It

needs only to be said that the trial judge, who saw both witnesses, acted entirely within his discretion as the trier of fact in accepting the evidence of Mr. Birmelin. Of course, the existence of an attorney-client relationship between him and the plaintiffs does not affect the right of the trial judge to credit Birmelin's account. E.g., PHILIP v. GRIFFITH, Fla.App. 1958, 100 So.2d 197; TONER v. HUBBORD, Fla.App. 1958, 105 So.2d 180, cert. denied, Fla. 1959, 109 So.2d 168. In the two cases primarily relied upon by the appellants, SHOCKNEY v. MARSH, 83 Ind. App. 407, 147 N.E. 292, and HYMAN v. SUCCESSION OF PARKERSON, 140 La. 249, 72 So. 953, the appellate courts affirmed judgments based upon findings of fact that the notes in question were given to discharge a potential or actual obligation on the part of the maker to the payees, based upon alleged or acknowledged negligence in making improper or unwarranted investments for them. In this case, there were no such findings of fact; the evidence accepted by the trier of fact was directly to the contrary.

It needs to be added, moreover, that even under Mr. Boymer's version of the circumstances, consideration does not exist. It is established in, for example, one of the very cases cited by the appellants, that mere forbearance to pursue remedies on the part of the payees is not sufficient to establish a valuable consideration. There must be, in addition, a specific agreement to forbear. SAUNDERS v. BANK OF MECKLENBURG, 112 Va. 443, 71 S.E. 714, 717. As is said in CITY OF VALPARAISO v. LONG, Fla.App. 1962, 141 So.2d 334, 335:

> "Forbearance to enforce a legal right is sufficient consideration for a promise where such forbearance is requested."

Even Boymer did not say, (see R. 94-95) that he had agreed not to pursue his remedies nor that Birmelin had requested him to do so in exchange for execution of the note. The existance of forbearance may be evidence of such an agreement, but, again, the trier of fact would not have been required, even if he believed Boymer, to draw any such conclusion. See SAUNDERS v. BANK OF MECKLENBURG, supra.

In essence, however, the case is a simple one of the trier of fact resolving disputed issues of the case. Here, as in the attorney-client case of PHILIP v. GRIFFITH, supra, at 100 So.2d 198:

> "...The testimony presented at the trial shows that the chancellor reached his decision largely on conflicting testimony, and that there was ample evidence before him to sustain his decree. We find no error of law that would justify a reversal of this case, and as it was within the province of the trier of facts to resolve the conflicts in the evidence, this court will not disturb his findings where there is substantial evidence supporting them."

IV.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

HORTON & SCHWARTZ
410 Concord Building
Miami, Florida 33130

Attorneys for Appellee

By _____
Alan R. Schwartz

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellee has been mailed to: HENDRICKS & HENDRICKS, Attorneys for Appellants, 1441 S. W. First Street, Miami, Florida, this 18th day of April, 1969.

_____
Alan R. Schwartz

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1969

CASE NO. 68-913

[TITLE OMITTED]

Opinion filed October 21, 1969.

An Appeal from the Circuit Court for Dade County, Henry L. Balaban, Judge.

Hendricks & Hendricks, for appellants.

Goodman & Peterson; Horton & Schwartz, for appellee.

Before CHARLES CARROLL, BARKDULL and HENDRY, JJ.

CARROLL, Judge.

This is an appeal by the plaintiffs below from an adverse judgment, entered following trial without a jury, in an action on a promissory note.

The defendant did not dispute the making and delivery, or the maturity and nonpayment of the note, but pleaded want of consideration. The appellants seek reversal on the ground that the judgment is contrary to the evidence, in that the defendant failed to establish his affirmative defense by a preponderance of the evidence on that issue. We find merit in that contention, and reverse.

The defendant was called as an adverse witness by the plaintiffs, and his testimony disclosed the following facts. The defendant Birmelin was and is a practicing lawyer in Dade County, and at the times involved the plaintiffs were his clients. Prior to his admission to the bar the defendant had been employed on the plaintiffs' charter boat named Playtime. After his admission to practice, the defendant acted as attorney for plaintiffs in several transactions, including preparation of their wills. In October of 1958 the defendant represented the plaintiffs in the sale of their boat, and submitted a statement entitled "Sale of Playtime, investment plan." That showed the proceeds of the sale were approximately $21,000; that $5,935 thereof had been paid over to Boymer; and that the balance of the proceeds, $15,110, had been invested by the defendant for the plaintiffs. As listed in that report, the investments made for plaintiffs were loans of $11,000 to Central Insurance Agency, Inc., and $1,000 to Shale Development Corp., investment of $1,100 in a second mortgage and an item designated as a business loan to Gourmet Mart. Prior to the time those investments were made the defendant had been attorney for Central Insurance Agency, Inc., and at the time of the investments was attorney for one Shale, who was a principal officer in the two corporations.

The loan of $11,000 to Central Insurance Agency, Inc., was evidenced by two notes, one for $10,000 and one for $1,000. The former note is shown in the record. The latter, of $1,000, was not produced. The $10,000 note, dated December 10, 1958, was made payable to the defendant Robert C. Bermelin, as trustee. It provided for interest at the rate of 15% per annum, payable monthly, and, as to the payment of principal, stated: "Payment will

be made by the corporation within six months upon demand." Also typed on the note was the following: "This Note is secured by assets of like value held by the corporation." However, the note was unsecured, and a then current tax return of the corporation listed the corporation's assets as $1,116,791 and its liabilities as $968,607.43, with a loss of $24,310.96 shown for the year to which it related.

The monthly interest payments on the Central Insurance loan appear to have been made until some time in the fall of 1961. On September 21, 1961, the plaintiff Ray Boymer sent a letter to the defendant which included the following:

> "My final point in closing, is to remind you of my letter dated January of this year, in which I indicated a desire to convert my funds in Central Insurance Agency and Shale Development Corp., (held in your Trust Acc't) to cash. At that time, I am sure conditions were more favorable than now, as you mentioned in the aforesaid discussion. At any rate, according to the noted copies of this (these) Corp., it is payable 6 months on demand of the Corps. For this reason, I had hoped to, and was assured by you, that I would receive the 'hard earned' savings involved, certainly by July of this year.
>
> "Owing to the fact that I have barely earned expenses in yacht management. (with some accounts receiveable), I have tried this year to do better in Brokerage of yachts. This has proved disasterous due to timing and the market.

> For this reason, even tho' we have been most careful with our personal finances, we have depreciated our invested capital with you, by some $5,000, and have even been forced to use monies in emergency savings.
>
> "As your trustee, I am asking you to use whatever legal process you deem necessary to force payment from the assets of the Corp. involved. Due to dire financial circumstances, and in due regard for the necessities of the family, I deem this step necessary, and feel confident that you will do all in your power to protect our interests."

The defendant testified that in the making and handling of these investments for the plaintiff he undertook to act as their "trustee" and to service the loans for them. As indicated by the above quoted portion of the September 1961 letter, Boymer had instructed the defendant in January of that year to proceed to collect the principal of the $10,000 note of Central Insurance Agency, Inc. (and another note), and, being aware of the provision for payment within six months after demand, had expected payment to be made around July of 1961. Boymer testified that when he requested that the loan be paid, Birmelin told him it would be paid in six months. It appears that the separate $1,000 loan to the Shale corporation was repaid, but that no formal demand was made by the defendant on behalf of the plaintiffs on Central Insurance Agency, Inc. for payment of the $11,000 loan, no payment on the principal was made in July of 1961, or thereafter, and no proceedings were instituted against the corporation for the collection thereof.

Later in 1961 the plaintiff Boymer consulted another lawyer regarding the matter. The latter had a telephone conversation with the defendant, as to which defendant testified as follows:

> "I told him that the condition of the company was, financially, not good, as far as I could see and certainly that they had the right to file suit on the note."

Thereafter Boymer called upon the defendant at his office, and the $10,000 note given by defendant to Boymer and his wife was an outgrowth of that meeting. Boymer testified with reference thereto as follows:

> "Q. Now, tell the Court just the facts and circumstances surrounding the execution and delivery of this note to you and Mrs. Boymer which is dated February 27, 1962, and is admitted as Plaintiffs' Exhibit 1.
>
> "A. Well, by now I realized this money wasn't forthcoming, and I wanted to find out why, so I came down to Mr. Birmelin's office on or about that time.
>
> "Q. Was your wife with you?
>
> "A. No, I came down alone. I didn't want her to be aware, actually, that we were in financial stress, which we were.
>
> "I came to Birmelin's office to find out what he was going to do about it, because we hadn't heard or received any moneys.
>
> "Mr. Birmelin told me then that this com-

pany was in fact in trouble and up to that time, actually, I had never really understood what the nature of the business of the company was, but from whatever he said at the time, I felt that it was not a — this is another reason why I wanted to get the records on the company or something— and the reason I wanted them is so that I could go before somebody and get some advice.

"I left his office feeling just a little bit stunned over the fact that apparently all this money was all down the drain.

"Q. Is that approximately the first time that Mr. Birmelin advised you that this company was in difficulty or trouble?

"A. That is correct, sir, and I told him that leaves me no alternative.

'If you can't help me in the matter, then I will just simply have to go before the Bar Association', and I left the office.

"Mr. Birmelin suggested that we, I believe, we went down to the restaurant. He suggested that we talk it over and see what could be done before I went to the Bar Association.

"I don't know how it happened, but after we left the restaurant, as far as I remember, there was nothing resolved in the restaurant. Right on the corner of Flagler Street here and Miami Avenue he said, 'Ray, I will give you a note. How much do you want me to make the note out for?'

"I told him, 'Bob, I don't know at this point what actually is owed me and the last time we

were at the house and we received a statement from you, we had agreed on a figure, between the two of us we agreed that it was somewhere in the neighborhood of $13,000.'

"I said, 'Well, is it agreeable for you to make out the note for $10,000?'

"This is what we agreed to."

As to his reason or purpose in giving the note the defendant testified:

"Your Honor, I felt a moral obligation to Ray Boymer and his wife. I felt a very close kinship to them over a period of years. I didn't want to see that they would lose anything. Ray Boymer said that the obligation that was owed was $10,000. I didn't even question it. I just signed a note and said by virtue of signing this note I will try to get back to Shale and try to collect this money, and I assumed that was the basic balance of it at that time, and I did no checking and that was the second error that I did."

The promissory note for $10,000 which the defendant made and delivered to plaintiffs on February 27, 1962, was made payable three years after that date, with six percent interest payable semi-annually. It is disclosed in the record that it was the understanding of the parties that any amounts which might be paid by Central Insurance in reduction of the principal of the $11,000 loan to it would be credited on the defendant's $10,000 note to the plaintiffs. No such payments by Central were received thereafter.

By the time the defendant gave his note to the plaintiffs, the Central Insurance Agency, Inc., had fallen into financial difficulties which were such as to prevent it from paying the obligation. Thereafter the corporation was involved in a liquidation from which no monies became available for payment to the plaintiffs as unsecured creditors. The defendant participated in the liquidation as attorney for the corporation, to some extent which is not clear from the evidence.[1]

When the defendant's note became due three years after the making and delivery he refused payment thereof; and plaintiffs then filed this suit for collection of the principal and the interest thereon. On this appeal from the judgment in favor of the defendant, the determinative question is whether there was substantial competent evidence to support the conclusion reached by the trial judge that the affirmative defense of want of consideration was established. Primarily it must be noted that on the issue created by that affirmative defense, notwithstanding its presentation in the case in the form of a sworn answer, the defendant had the burden of establishing the defense by a preponderance of the evidence. See Biro v. Geiser, Fla.1967, 199 So.2d 461, so holding because of the existence and effect of Rule 1.110(d), RCP.

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[1]Referring to the period after his note was given to the plaintiffs, the testimony of the defendant included the following: "Q Well, then, basically you did absolutely nothing for the benefit of Mr. Boymer? A No, I didn't do absolutely nothing. I executed a note. I tried to do something. * * *. A I made no collections, no. Q And you took no legal action on behalf of Mr. Boymer in connection with the collection, did you? A No, I did not. Q And you did participate, did you, in the liquidation, so to speak of Central Insurance Agency? A There were some properties that I did participate in, yes. Q And you were returning those to mortgagors of the property, or mortgagees of the property? A That's correct, yes."

In our view the trial court was in error in holding that the defendant successfully met that burden, and that want of consideration was established by a preponderance of the evidence — a necessary holding in granting judgment for the defendant. On the evidence presented consideration for the note was shown in two respects. In making and handling investments for the plaintiffs, the defendant attorney acted as their agent and as a self-designated trustee, with the consequent duty to exercise due care and reasonable business judgment therein. Without attempting detailed comment on the evidence, it was clearly shown that at the time defendant's note was given to the plaintiffs, Boymer was questioning whether those duties had been fulfilled and had announced an intention to undertake or continue investigation thereof and to present the matter to the Bar Association. It is also clear that the giving of the note by the defendant attorney operated to forestall such further action by Boymer during the three year term of the note. It is well recognized that forbearance to enforce a legal right may constitute consideration for a promise. It is not required that the forbearance be provided for in express language or terms. This is so because a request by the promisor or undertaking by the promisee to forbear may be implied from conduct of the parties and the nature of the transaction. Consideration is supplied when the circumstances are such that it is reasonable to infer that forbearance was desired and sought by the promisor and forbearance by the promisee follows. See City of Valparaiso v. Long, Fla.App.1962, 141 So.2d 334; 17 Am.Jur.2d Contracts, § 115; 1 S.Williston on Contracts, § 135 (3d ed.1957); Anno. 74 A.L.R. 293.

A business transaction of this nature between a lawyer and his client or clients should be given careful scru-

tiny. Here, if we should accept the defendant lawyer's contention that the note he gave was without legal effect, we would be required to assume the lawyer purposely gave his clients a worthless note knowing and intending they should hold it three years, relying on its validity which he impliedly represented to them. We are reluctant to so assume. Rather, we view the record as showing that the note was given for certain forbearance by the clients, that the intended forbearance resulted, and that the note therefore was valid and enforceable.

Another reason for assigning validity to the note is that it was given as an accounting and settlement by the attorney for his stewardship in the matter, which was under investigation by his then disgruntled clients. This is so because his action in giving them his personal note, at the time and in the circumstances then prevailing, in view of what had occurred earlier, indicates there was an awareness by the defendant that he was subject to a possible claim by the clients that the Central Insurance loan was improvident and that he had been negligent and lacking in diligence in failing to obtain its repayment. A promissory note given by an agent or trustee as an accounting or settlement in such an instance is supported by adequate consideration. See Hyman v. Succession of Parkerson, 140 La. 249, 72 So. 953; Shockney v. Marsh, 83 Ind.App. 407, 147 N.E. 292; 10 C.J.S., Bills and Notes, § 151, at 623.

For the reasons stated, the judgment for the defendant is reversed, and the cause is remanded to the circuit court with direction to enter judgment in favor of the plaintiffs.

Reversed and remanded with direction.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 68-913

[TITLE OMITTED]

PETITION FOR REHEARING

The appellee, ROBERT C. BIRMELIN, respectfully petitions the Court for a rehearing of its decision and judgment of a reversal dated October 21, 1969, and, in support of this petition, respectfully shows the Court as follows:

1. The Court overlooked or failed to consider that its decision represents "a complete and unique departure from virtually every established principle of appellate review—that the record must be viewed in the light most favorable to the judgment below; that it is to be assumed that the finder of fact, and particularly a trial judge, based his determination upon a proper application of the law and the facts as he found them; that an appellate court may not properly re-assess the evidence or substitute its judgment concerning the credibility of witnesses or the record as a whole for that of the finder of fact, so long as there is any evidence to support the finding below." There is no need here to cite the multitude of cases so holding.

In this case, however, the Court's entire opinion is avowedly based upon its "view [of the] record" (Opinion of Court, p. 7). That view accepts a version of the circumstances directly contrary to that of a witness—Mr. Birmelin—whom the trial judge, the finder of fact, had

an eminent right to, and did obviously, believe; it represents also an acceptance of the version of the facts—that of Mr. Boymer—which the trial judge, the finder of fact, had an eminent right to, and did obviously, disbelieve. The testimony of Mr. Birmelin, which this Court, as an appellate finder of fact, rejected, was directly contrary to the conclusions reached by the Court that the note in question was given in return for (a) forbearance; and (b) as a settlement of a disputed claim. That testimony was as follows:

> "... what were the circumstances surrounding the giving of this note by you to Mr. and Mrs. Boymer?
>
> "A. What date are you referring to?
>
> "THE COURT: February 27, 1962.
>
> BY MR. HENDRICKS:
>
> "Q. This note that's being sued on.
> "A. Yes, sir. My recollection was that Ray called me up. We had lunch together. He said the amount of money he thought he had invested in the company and I said, "Well, I will do everything I can to try to collect the funds, Ray, for you and as evidence of good faith, I will execute a note."
>
> "THE COURT: As what?
>
> "THE WITNESS: "I will execute a note."

"MR. HENDRICKS: As evidence of good faith.

"THE WITNESS: "I will try to collect the money from Central Insurance Agency."

BY MR. HENDRICKS:

"Q. Why did you execute a note?

"A. I felt very concerned for Mary and Ray. I had been long-time friends for them. I felt a moral obligation to try to do whatever I could to see that any part of their investment was refunded, returned.

"Q. Did you represent to them that Central Insurance Agency was having difficulties and that this would give them more time?

"A. No, I don't believe so. I did represent that difficulties were being experienced at that time as a general condition throughout the country.

"Q. Did you prepare this note?

"A. Yes, sir. The note that you are referring to?

"Q. That's right.

"A. The one that I executed, yes, I did.

"Q. Did you tell Mr. Boymer that there was no consideration for the note and that you would not pay it?

"A. I told him whatever I collected from the company I would reimburse him on.

"Q. In other words, you were going to attempt to collect from the company and you were going to pay off this note from the company?
"A. That's correct.

"Q. Not from your own personal funds?
"A. No, never.

"Q. You didn't consider this to be a personal obligation to you at all?
"A. No, I did not.

"Q. And you explained all that very thoroughly and very fully to Mr. and Mrs. Boymer, to Mr. Boymer?
"A. We discussed it. I'm sure that we covered the point. I said whatever I could collect from Central Insurance Agency would be given to him." (R. 43-45)

There is no dispute that, if Birmelin was believed—as he was by the finder of fact—his testimony established a lack of consideration for the note; mere "moral obligation" cannot constitute a valid consideration. E.g., 4 Fla. Jur., Bills, Notes and Checks, §56, p. 386; 11 Am.Jur.2d, Bills and Notes, §219, p. 247.

2. The Court has apparently concluded that the usual view as to the resolution of conflicting testimony by the finder of fact, and the role of an appellate court in reviewing such conclusions, do not apply because the transaction involved one between an attorney and his client. If this is the case, the Court has overlooked or failed to

consider the myriad of cases which hold that lawyers are not second class citizens before the trial or appellate courts, and that the existence of an attorney-client relationship does not affect the right of the trial judge to believe the attorney's account. E.g., Philip v. Griffith, Fla.App. 1958, 100 So.2d 197; Toner v. Hubbard, Fla.App. 1958, 105 So.2d 180, cert. denied, Fla. 1959, 109 So.2d 168.

WHEREFORE, the appellee, Robert C. Birmelin, respectfully petitions this Court for a rehearing of this cause.

Respectfully submitted,

HORTON & SCHWARTZ
410 Concord Building
Miami, Florida 33130

Attorneys for Appellee

By _____
Alan R. Schwartz

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing has been mailed to: HENDRICKS & HENDRICKS, Attorneys for appellants, 1441 S. W. First Street, Miami, Fla. this 4th day of November, 1969.

_____
Alan R. Schwartz

APPENDIX G

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 68-913

[TITLE OMITTED]

PETITION FOR CERTIFICATION OF DECISION AS ONE INVOLVING QUESTION OF GREAT PUBLIC INTEREST

The appellee, Robert C. Birmelin, respectfully petitions the Court for an order certifying this cause as one "involving a question of great public interest", under Article V §2 of the Florida Constitution, as one involving serious and important questions concerning the obligations of attorneys and the standards to be applied in assessing their rights as litigants in the trial and appellate courts of our state.

Respectfully submitted,

HORTON & SCHWARTZ
410 Concord Building
Miami, Florida 33130
Attorneys for Appellee

By _____
Alan R. Schwartz

I HEREBY CERTIFY that the foregoing has been mailed to HENDRICKS and HENDRICKS, Esqs., Attorneys for appellants, 1441 S. W. First Street, Miami, Florida, on this 4th day of November, 1969.

Alan R. Schwartz

APPENDIX H

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1969

FRIDAY, NOVEMBER 7, 1969

CASE NO. 68-913

[TITLE OMITTED]

Counsel for appellee having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:
s/ William Kent
Clerk District Court of
Appeal, Third District

cc: Horton & Schwartz
Hendricks & Hendricks
Goodman & Petersen

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

APPENDIX I

IN THE SUPREME COURT OF FLORIDA

[TITLE OMITTED]

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

The petitioner, ROBERT C. BIRMELIN, presents this, his petition for writ of certiorari to the District Court of Appeal, Third District, and states:

1. Petitioner seeks to have reviewed a decision and judgment of the District Court of Appeal, Third District, dated October 21, 1969, (attached hereto as Exhibit A), rehearing denied on November 7, 1969, (order attached hereto as Exhibit B), duly filed in the records of said Court and reported as Boymer v. Birmelin, Fla.App. 1969, 227 So.2d. 358.

2. This petition is presented under and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules, on the ground that the decision below is in "direct conflict" with prior decisions of this Court and of the First and Second District Courts of Appeal.

3. This petition is accompanied by a motion for extension of time to permit petitioner to file a conformed transcript of portions of the record of the proceedings, and the brief in support of the petition for writ of certiorari.

4. The following are the facts of the case:

In the Dade County Circuit Court, the defendant-petitioner won a final judgment entered after a non-jury trial, is an action on a promissory note.

The answer of the defendant-petitioner, Robert C. Birmelin, a Miami attorney, admitted execution and delivery of the $10,000.00 note in question to the plaintiff-respondents, Ray Boymer and Mary Boymer, and pleaded the affirmative defense of lack of consideration. After a trial at which the only witnesses were the defendant, Mr. Birmelin, and Mr. Boymer, the trial judge, sitting as the trier of fact, entered a simple judgment for the defendant, which obviously reflected his acceptance of the affirmative defense, and, necessarily, his resolution of the conflicts in the testimony in favor of the defendant.

The defendant, Mr. Birmelin, had been a longtime friend of the plaintiffs prior to his admission to the Bar in 1952; after that time he represented them as an attorney in various transactions. In 1958, the Boymers, who had sold their charter boat, invested much of the proceeds in four loans in the total amount of $17,110.00. Birmelin acted as "servicing agent" for the Boymers in the collection of the loans which were made payable to him, as Trustee. Three of the obligations were collected and paid in full; on the fourth note, an $11,000.00 corporate note made payable to Mr. Birmelin, as Trustee, by the Central Insurance Agency, Inc., payments were made from 1958 to 1961. At that time the Central Insurance Agency became unable to make further payments. Birmelin had represented Central Insurance and had recommended the investment to the Boymers; he had, however, no interest in

the company and gained no personal benefit (apart from a $1.00 per month servicing fee) whatever from the loan. An attorney, acting on the Boymers' behalf, had called Birmelin asking about the status of the notes in late 1961. Birmelin stated that Boymer could "file suit" if he cared to, on the Central Insurance Agency note.

In February 1962, the note upon which this suit was based was executed by Birmelin. The circumstances under which this occurred were the subject of substantial dispute between Birmelin and Boymer at the trial. Boymer stated that the note was signed by Birmelin after Boymer had said that if Birmelin could give him no satisfaction concerning the payments which had not been made, he would "go before the Bar Association". Birmelin, on the other hand, in testimony which was obviously accepted by the trial judge, stated that he had executed the note purely out of a sense of moral obligation to the Boymers and a desire that they should not lose money as a result of the investment in which he had played a part. He had stated that the note did not represent a personal obligation of his but that it would be employed in a rather quixotic, and what turned out to be an unsuccessful attempt, to secure the money from the Central Insurance Agency. Birmelin's account of the events did not, of course, include any reference to Boymer's threat "to go to the Bar Association"; and neither Boymer's nor Birmelin's included any reference to an agreement of Boymer to refrain from an action on the note or one against the defendant himself, in return for Birmelin's signature.

Based upon the testimony of Birmelin and Boymer, the trial judge entered judgment for the defendant which, again, clearly represented a finding for him on the only

issue in dispute — that of lack of consideration for the promissory note which had been admittedly signed and executed.

The plaintiffs then appealed to the District Court of Appeal, Third District, from the adverse final judgment. In the decision now sought to be reviewed, the Third District Court of Appeal reversed the judgment in Mr. Birmelin's favor. It did so, purely, simply, and virtually admittedly, upon its own independent "view [of] the record . . . " 227 So.2d, at 362. This view of the record accepted a version of the circumstances directly contrary to that of a witness — Mr. Birmelin — whom the trial judge, the finder of fact, had an eminent right to, and obviously did, believe. It represented also an acceptance of a version of the facts — that of Mr. Boymer — which the trial judge, as a finder of fact, had the eminent right to, and obviously did, *dis*believe. The Third District's independent assessment of the record, including its acceptance of the testimony of a witness rejected by the trial judge, resulted in an order to enter judgment in favor of the plaintiffs on the promissory note.

5. The decision below is in constitutional "direct conflict" with the innumerable cases, such as the decision of this Court in *Chakford v. Strum*, Fla.1956, 87 So.2d. 419 and that of the First District Court of Appeal in *Lowrey v. Rosenberg*, Fla.App.1962, 147 So.2d. 321, which hold that the decision of a trial judge, sitting as the finder of fact, must be affirmed if there is competent, substantial evidence, whether contradicted or not, to support it; and that an appellate court may not properly reassess the evidence or substitute its independent judgment concerning the creditability of witnesses for that of the trial judge.

6. The decision below, insofar as it concluded that the usual view as to the resolution of conflicting testimony by the finder of fact, and the role of an appellate court in reviewing such conclusions, does not apply because the transaction involved was one between an attorney and his client, is also in "direct conflict" with the decision of this Court in *Davant v. Lambdin*, 135 Fla. 700, 186 So. 201 and the decision of the Second District Court of Appeal in *Philp v. Griffith*, Fla.App.1958, 100 So.2d. 197. These cases hold that the identical rules of appellate review apply to cases in which lawyers are involved, and that the existence of an attorney-client relationship does not affect the right of the trial judge to believe the attorney's, rather than the client's, account of the circumstances.

7. For the reasons to be developed in the brief of petitioner, the opinion and decision of the Third District Court of Appeal, herein sought to be reviewed, is in constitutional "direct conflict" with the aforementioned decisions of this Court and of the First and Second District Courts of Appeal.

WHEREFORE, the petitioner submits that this Court has jurisdiction in this cause, that it should grant this Petition for Writ of Certiorari, and that, upon a review of the cause on its merits, it should quash the decision of the District Court of Appeal, Third District herein.

Respectfully submitted,

HORTON & SCHWARTZ
Attorneys for Petitioner
410 Concord Building
Miami, Florida 33130

By_____
Alan R. Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition for writ of certiorari, together with attached exhibits, has been served by mail, this 4 day of December, 1969, upon HENDRICKS & HENDRICKS, Attorneys for respondents, 1441 S.W. First Street, Miami, Florida.

Alan R. Schwartz

APPENDIX J

IN THE SUPREME COURT OF FLORIDA

CASE NO. 39,226

[TITLE OMITTED]

BRIEF OF PETITIONER

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11 AmJr.2d, Bills and Notes, §219, p. 247

Fla.Jur., Contracts §52, p. 107

4 Fla.Jur., Bills, Notes and Checks §56, p. 386

I.

STATEMENT OF THE CASE

The petitioner, Robert C. Birmelin, seeks review, by "direct conflict" certiorari, of the decision of the Third District Court of Appeal in BOYMER v. BIRMELIN, Fla. App. 1969, 227 So.2d 358. The decision reversed a judgment for the petitioner-defendant in an action on a promissory note, in which the petitioner successfully pleaded and proved lack of consideration in the Circuit Court, and ordered judgment entered in favor of the respondents, who were the plaintiffs in the Circuit Court.

The cause arose when the respondents, Ray and Mary Boymer sued the petitioner, a Miami attorney, Robert C. Birmelin, in the Dade County Circuit Court on the promissory note in question (T. 1-2).

The defendant's answer admitted execution and delivery of the $10,000.00 note in question to the plaintiff-respondents, Ray Boymer and Mary Boymer, and pleaded the affirmative defense of lack of consideration (T. 3-4). After a trial at which the only witnesses were the defendant, Mr. Birmelin, and Mr. Boymer, the trial judge, sitting as the trier of fact, entered a simple judgment for the defendant, (T. 10) which obviously reflected his acceptance of the affirmative defense, and, necessarily, his resolution of the conflicts in the testimony in favor of the defendant.

As reflected in the District Court decision, the defendant, Mr. Birmelin, had been a longtime friend of the plaintiffs prior to his admission to the Bar in 1952; after that time he represented them as an attorney in various transactions. In 1958, the Boymers, who had sold their charter boat, invested much of the proceeds in four loans

in the total amount of $17,110.00. Birmelin acted as "servicing agent" for the Boymers in the collection of the loans which were made payable to him, as Trustee. Three of the obligations were collected and paid in full; on the fourth note, an $11,000.00 corporate note made payable to Mr. Birmelin, as Trustee, by the Central Insurance Agency, Inc., payments were made from 1958 to 1961. At that time the Central Insurance Agency became unable to make further payments. Birmelin had represented Central Insurance and had recommended the investment to the Boymers; he had, however, no interest in the company and gained no personal benefit (apart from a $1.00 per month servicing fee) whatever from the loan. An attorney, acting on the Boymer's behalf, had called Birmelin asking about the status of the notes in late 1961. Birmelin stated that Boymer could "file suit" if he cared to, on the Central Insurance Agency note.

In February, 1962, the note upon which the suit was based was executed by Birmelin (T. 2). The circumstances under which this occurred were the subject of substantial dispute between Birmelin and Boymer at the trial. Boymer stated that the note was signed by Birmelin after Boymer had said that if Birmelin could give him no satisfaction concerning the payments which had not been made, he would "go before the Bar Association."

Birmelin, on the other hand, in testimony which was obviously accepted by the trial judge, stated that he had executed the note purely out of a sense of "moral obligation" (T. 5-6, 8) to the Boymers and a desire that they should not lose money as a result of the investment in which he had played a part. He had stated that the note did not represent a personal obligation of his but that it would be employed in a rather quixotic, and what turned

out to be an unsuccessful attempt to secure the money from the Central Insurance Agency (T. 5-8). Birmelin's account of the events did not, of course, include any reference to Boymer's threat "to go to the Bar Association." (T. 5-8)

Based upon the testimony of Birmelin and Boymer, the trial judge entered judgment for the defendant, which, again, clearly represented a finding for him on the only issue in dispute — that of lack of consideration for the promissory note which had been admittedly signed and executed. (T. 10) The defendants then appealed to the District Court of Appeal, Third District, from the adverse final judgment. The sole assignments of error (T. 11) contended that the trial court had erred in his determination from the testimony that there was in fact no valid consideration for the note. In the decision now sought to be reviewed, the Third District agreed with his contention and reversed the judgment in the petitioner's favor. It did so, purely, simply, and virtually admittedly, upon its own independent "view [of] the record . . . " 227 So.2d at 362. This view of the record accepted a version of the circumstances directly contrary to that of a witness—Mr. Birmelin—whom the trial judge, the finder of fact, had an eminent right to, and obviously did, believe. It represented also an acceptance of a version of the facts—that of Mr. Boymer—which the trial judge, as a finder of fact, had the eminent right to, and obviously did, *dis*believe. The third District's independent assessment of the record, including its acceptance of the testimony of a witness rejected by the trial judge, resulted in an order to enter judgment in favor of the plaintiffs on the promissory note.

The defendant then filed this Petition for Writ of Certiorari to review this decision.

II.

POINTS INVOLVED

The sole issues properly before the Court at this time concern its jurisdiction to review the merits of the decision below. Accordingly, the points involved are:

POINT I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH CHAKFORD v. STRUM, Fla. 1956, 87 So.2d 419 AND LOWREY v. ROSENBERG, Fla.App. 1962, 147 So.2d. 321.

POINT II

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT CONFLICT WITH DAVANT v. LAMBDIN, 135 Fla. 700, 186 So. 201 AND PHILP v. GRIFFITH, Fla.App. 1958, 100 So.2d 197.

III.

ARGUMENT

A. Direct Conflict With CHAKFORD and LOWREY Cases.

The decision below in BOYMER v. BIRMELIN represents nothing more nor less than the appellate court's substitution of its judgment concerning the credibility of the witnesses and the weight of the testimony, for that of the finder of fact—her the trial judge—who actually

saw the witnesses and had the sole responsibility for resolving conflicts in their testimony. Thus, the decision involves a complete and unique departure from virtually every established principle of appellate review—that the record must be viewed in the light most favorable to the judgment below; that it is to be assumed that the finder of fact, and particularly a trial judge, based his determination upon a proper application of the law and the facts as he found them; that an appellate court may not properly reassess the evidence or substitute its judgment concerning the credibility of witnesses or the record as a whole for that of the finder of fact, so long as there is *any* evidence to support the finding below. Thus, the decision is in constitutional "direct conflict" with a multitude of cases; among them the decision of this Court in CHAKFORD v. STRUM, Fla. 1956, 87 So.2d 419, and that of the First District in LOWREY v. ROSENBERG, Fla.App. 1962, 147 So.2d 321, which so held.

There can be no question but that the trial judge's conclusion that there was no valid consideration for the note was fully supported by the evidence he was entitled to believe. Birmelin specifically stated that there were no threats by Boymer to go to the "Bar Association"; and that the note was executed not in order to induce forebearance, or in settlement of a disputed claim, but purely and simply out of a sense of "moral obligation" (T. 5-6, 8). Clearly, such a moral obligation is not sufficient to constitute valid consideration. E.g., 7 Fla.Jur., Contracts, §52, p. 107; 4 Fla.Jur., Bills, Notes and Checks, §56, p. 386. As is said in 11 Am.Jur.2d Bills and Notes, §219, p. 247:

> "As in regard to executory contracts generally, it is held that a mere moral obligation arising

> from ethical motives or a mere conscientious duty, unconnected with any legal obligation, perfect or imperfect, or (under the later cases) with the receipt of benefit by the promisor of a material or pecuniary nature, will not furnish a consideration for a bill or note. Thus a moral obligation based on honor and dignity, past gratuitous or inadequately compensated services, services or support rendered to another person, or the debt of another, even though the other person is a relative, is not consideration."

The District Court, however, based upon what was admittedly its own "view of the record", 221 So.2d at 362, simply declined to believe Birmelin's version of the facts, which the trial judge had accepted; and accepted that of Boymer, which the fact finder had rejected. Its acceptance of that version resulted in findings of fact by the District Court that the note was based upon the valuable considerations of forebearance and settlement.

It is clear that this process of appellate fact finding is in "direct conflict" with, e.g., the CHAKFORD case, in which this Court stated, at 87 So.2d 420:

> "The case was tried by the Circuit Judge upon a waiver of the jury by the parties. His factual findings in favor of the appellee are entitled to the weight of a jury verdict and will not be disturbed unless it is shown that there is a total lack of substantial evidence to support his conclusion. The record reveals adequate support for the findings and conclusion of the trial judge."
>
> The Judgment is, therefore, affirmed . . . "

It is direct conflict also with the LOWREY case, in which the First District held at 147 So.2d 321-322:

> "All parties waived their rights to a trial by jury in accordance with the procedural rules in Florida, and so the case was properly tried by the Circuit Judge, sitting, in effect, as the jury or trier of the facts. Under such circumstances, of course, an appellate court is not authorized to substitute its findings of fact for those of such judge, if sufficient competent, substantial evidence was adduced at the trial to support his findings of fact.
>
> In the appeal of a case like the present we need only to seek and find in the record of the trial sufficient competent, substantial evidence, whether contradicted or not, from which the Circuit Judge could have reasonably concluded, as he did conclude . . . "

The decision below is in direct conflict with these decisions and many others, which simply hold that an appellate court is not free to take its own "view [of] the record", and upon which to base its own independent conclusion of either the facts or the law.

The decision below—inasmuch as it so clearly departs from the ordinary rules of appellate review—may perhaps be explained as representing the District Court's view that the usual views as to the resolution of conflicting testimony by the finder of fact and the role of appellate courts in reviewing those conclusions do not apply because the transaction involved was one between an attorney and his client. If so, the decision is in direct conflict with this Court's

decision in DEVANT v. LAMBDIN, 135 Fla. 700, 186 So. 201 and PHILP v. GRIFFITH, Fla.App. 1958, 100 So.2d 197, in which it was held directly to the contrary. As was said in the PHILP case, which involved a similar transaction between attorney and client, at 100 So.2d 198:

> "The testimony presented at the trial shows that the chancellor reached his decision largely on conflicting testimony and that there was ample evidence before him to sustain his decree. We find no error of law that would justify a reversal of this case, and as it was within the province of the trier of facts to resolve the conflicts in the evidence, this court will not disturb his findings where there is substantial evidence supporting them."

IV.

CONCLUSION

It is respectfully submitted that "direct conflicts" clearly appear; that this Court, therefore, has jurisdiction in the cause; and that the Petition should, therefore, be granted.

Respectfully submitted,

HORTON & SCHWARTZ
Attorneys for Petitioner
410 Concord Building
Miami, Florida 33130

By _____
Alan R. Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner has been mailed to HENDRICKS & HENDRICKS, Attorneys for respondents, 1441 S. W. First Street, Miami, Florida, this 21st day of January, 1970.

Alan R. Schwartz

APPENDIX K

IN THE SUPREME COURT OF FLORIDA

CASE NO. 39,226

[TITLE OMITTED]

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Messrs. Horton Schwartz
Messrs. Hendricks & Hendricks

A True Copy

TEST:
/s/ Sid J. White
Clerk Supreme Court.

APPENDIX L

IN THE SUPREME COURT OF FLORIDA

CASE NO. 39,226

[TITLE OMITTED]

PETITION FOR REHEARING

The petitioner, Robert C. Birmelin, respectfully petitions the Court for a rehearing of its decision dated March 16, 1970, denying the Petition for Writ of Certiorari, and shows the Court in support of this Petition as follows:

1. In determining that the Court was "without jurisdiction", the Court overlooked or failed to consider the fact that the District Court substituted its judgment as to the credibility of the witnesses and the weight of the evidence for that of the trial judge, on the basis of what was admittedly its own "view [of] the record". This determination plainly brought the District Court into constitutional "direct conflict" with, inter alia, CHAKFORD v. STRUM, Fla. 1956, 87 So.2d 419 and LOWREY v. ROSENBERG, Fla.App. 1962, 147 So.2d 321, which squarely hold that an appellate court may not reassess the evidence on appeal or substitute its conclusion concerning that evidence for that of the trier of fact, so long as there is any evidence—as there clearly was here—to support the finding below.

2. In determining that the Court was "without jurisdiction", the Court overlooked or failed to consider the fact that the District Court apparently held that the

ordinary rules of appellate review of findings of fact by the trial judge do not apply because the transaction involved the attorney-client relationship. This determination was likewise in constitutional "direct conflict" with prior decisions, including DEVANT v. LAMBDEN, 135 Fla. 700, 186 So. 201 and PHILP v. GRIFFITH, Fla.App. 1958, 100 So.2d 197, which directly hold that the identical rules concerning the respective roles of the trier of fact and an appellate court apply in attorney-client situations.

WHEREFORE, the petitioner, Robert C. Birmelin, respectfully petitions the Court to rehear its denial of certiorari and, on rehearing, to grant the Petition for Writ of Certiorari.

Respectfully submitted,

HORTON & SCHWARTZ
410 Concord Building
Miami, Florida 33130

Attorneys for Petitioner

By _____
Alan R. Schwartz

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to HENDRICKS & HENDRICKS, Attorneys for Respondents, 1441 S. W. First Street, Miami, Florida, this 23rd day of March, 1970.

_____
Alan R. Schwartz

APPENDIX M

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1970
MONDAY, APRIL 6, A.D. 1970

CASE NO. 39,226

[TITLE OMITTED]

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:
/s/ SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF MARCH 16, 1970, IN THE ABOVE CAUSE)

APPENDIX N

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1969

[TITLE OMITTED]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 3d., 1970.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 24th day of June, 1970.

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 28 1970
ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term, [redacted] 1970

No. 625

ROBERT C. BIRMELIN,

Petitioner,

vs.

RAY BOYMER and MARY BOYMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

B. E. HENDRICKS
1441 S.W. First Street
Miami, Florida

HENDRICKS & HENDRICKS
1441 S.W. First Street
Miami, Florida 33135
Of Counsel

MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

October Term, 1969

No. _____

ROBERT C. BIRMELIN,

Petitioner,

vs.

RAY BOYMER and MARY BOYMER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Respondents do not accede to Petitioner's statement of the question presented for review herein but submit that the question presented for review in this cause is correctly stated as follows:

> WHETHER ANY FEDERAL QUESTION WAS PRESENTED TO, OR WAS DECIDED BY, THE COURTS OF THE STATE OF FLORIDA IN THE INSTANT CAUSE.

STATEMENT OF THE CASE

The symbol "P App." will be utilized to denote any reference to the Appendix attached to the Petition for Writ of Certiorari herein. The symbol "TC" will be utilized to denote any references to the certified copy of the trial court record furnished under separate cover by the clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, in Case No. 67-18117. The symbol "AC" will be utilized to denote any references to the certified copy of the appellate court record furnished under separate cover by the clerk of the District Court of Appeal of Florida, Third District, in Case No. 68-913. The symbol "SC" will be utilized to denote any references to the certified copy of the record furnished under separate cover by the clerk of the Supreme Court of Florida in Case No. 39,226.

The Respondents, RAY BOYMER and MARY BOYMER, were the plaintiffs in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County and the appellants in the District Court of Appeal, Third District of Florida. The Petitioner, ROBERT C. BIRMELIN, was the defendant in the trial court and the appellee in the Florida Third District Court of Appeal.

The Respondents brought suit against the Petitioner upon a promissory note executed and delivered to them by the Petitioner (TC 1-2). The Petitioner, in his Answer, raised the affirmative defense of want of consideration (TC 3-4).

The Respondents and the Petitioner have been acquainted for a period in excess of 20 years. At one time

the Petitioner was employed as a mate upon a charter boat owned and captained by the Respondent, RAY BOYMER. In 1952, the Petitioner was admitted to the Florida Bar and has since been actively engaged in the practice of law in Dade County, Florida. The Petitioner represented the Respondents as their attorney on several occasions prior to 1958. During the latter part of that year the Respondent, RAY BOYMER, sold the vessel PLAYTIME owned by him to a person who was represented in that transaction by the Petitioner. The proceeds from the sale in the amount of TWENTY-ONE THOUSAND DOLLARS ($21,000.00) were paid over to the Petitioner as attorney and agent for the Respondents. The Petitioner disbursed approximately SIX THOUSAND DOLLARS ($6,000.00) of said proceeds to the Respondents. The Petitioner, acting as attorney and agent for the Respondents, retained the remaining sums and made investment loans on behalf of the Respondents.

The Petitioner, acting as attorney and agent for the Respondents, loaned ELEVEN THOUSAND DOLLARS ($11,000.00) of the Respondents' funds to CENTRAL INSURANCE AGENCY, INC. and another ONE THOUSAND DOLLARS ($1,000.00) of the Respondents' funds to SHALE DEVELOPMENT CORP. Both corporate borrowers were clients of the Petitioner. The Petitioner had represented CENTRAL INSURANCE AGENCY, INC. since 1956, and he testified that the principals in that corporation were JOHN P. SHALE and GRACE T. SHALE, his wife. The Petitioner organized SHALE DEVELOPMENT CORP. and was one of its officers, directors and stockholders together with the same JOHN P. SHALE and GRACE T. SHALE, his wife.

The Petitioner prepared the ELEVEN THOUSAND DOLLAR ($11,000.00) CENTRAL INSURANCE AGENCY, INC. promissory note (RT 1) and the ONE THOUSAND DOLLAR ($1,000.00) SHALE DEVELOPMENT CORP. promissory note (RT 2). Each of these notes was made payable to the Petitioner as "Trustee" and each note contained the following typewritten recitation:

> "This note is secured by assets of like value held by the corporation. Payment will be made by the corporation within six months upon demand."

However, the Petitioner took no security for the loans other than the promissory notes.

The Petitioner, acting as attorney and agent for the Respondents, serviced the SHALE DEVELOPMENT CORP. obligation and the CENTRAL INSURANCE AGENCY, INC. obligation and made disbursements to the Respondents through his office trust account. Subsequently, the SHALE DEVELOPMENT CORP. obligation was paid in full. However, CENTRAL INSURANCE AGENCY, INC. defaulted on its obligation, and no payments were made upon its promissory note after October, 1961. CENTRAL INSURANCE AGENCY, INC. became insolvent and is now defunct.

On February 27, 1962, the Petitioner, after conferring with the Respondent, RAY BOYMER, in regard to the CENTRAL INSURANCE AGENCY, INC. obligation, executed his promissory note to the Respondents (TC 2). The terms of said promissory note called for the payment of the principal sum of TEN THOUSAND DOLLARS ($10,000.00) together with interest at six percent per

annum by the Petitioner to the Respondents three years after the date of the execution of the note. Subsequently, in 1966, demand was made on the Petitioner for payment of his promissory note, but the Petitioner refused to pay the note.

The cause was tried without a jury. The Petitioner was called by the Respondents to testify as an adverse witness, and he also testified as a witness in his own behalf. The Respondents testified in their own behalf. No other witnesses appeared and testified. The testimony offered by the Respondents and the Petitioner was divergent in many respects and, in particular, was conflicting in regard to the circumstances regarding the execution and delivery of the Petitioner's promissory note to the Respondents. The Respondent, BOYMER, testified that the note was prepared, executed and delivered by the Petitioner after he told the Petitioner that if the Petitioner could not help him in the matter that he would have to go before the Bar Association (TC 93 - 95). The Petitioner testified that he had executed the note out of a sense of moral obligation to try to do whatever he could to see that a part of the Respondents' investment was returned (TC 71 - 74).

Thereafter, the trial judge entered a final judgment in favor of the Petitioner and against the Respondents (TC 173). Whereupon, the Respondents appealed the final judgment to the District Court of Appeal, Third District of Florida which reversed the decision of the trial court and directed that a judgment be entered in favor of the Respondents (AC 72 - 79; P App. 23 - 32). The Petitioner then filed his Petition for Rehearing (AC 80 - 83; P App. 33 - 37) which was denied without opinion (AC 85; P App. 41).

Subsequently, the Petitioner filed in the Supreme Court of Florida his Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida (SC Item 1 1 - 5; P App. 43 - 48) which was denied (SC Item 6; P App. 59). The Florida Supreme Court's memorandum opinion denying certiorari is reported at 237 So.2d 537. The Petition for Rehearing (SC Item 7 1 - 2; P App. 61 - 62) filed in the state Supreme Court was also denied without opinion (SC Item 8; P App. 63).

Thereupon, Petitioner filed his Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District in this Supreme Court of the United States.

ARGUMENT

The Petitioner in the instant cause seeks to invoke the jurisdiction of this Supreme Court under Title 28, U.S.C. § 1257(3) to review by writ of certiorari final judgments or decrees rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States. In essence, the Petitioner contends that the appellate courts of Florida refused to apply well established principles of appellate review in this cause simply because the Petitioner was an attorney in violation of the due process and equal protection provisions of Amendment XIV to the Constitution of the United States. However, the record before this Court clearly reflects that no such contention was ever presented to, or decided by, the state courts at any stage of the proceedings in this cause, and no title, right, privilege or immunity was specially set up or claimed by the Petitioner under the federal Constitution in the state courts.

The fact that the power of the Supreme Court to review decisions of state courts is limited to the review of those which involve federal questions and rights is too well established to require citation. Equally fundamental is the principle that the Supreme Court cannot entertain a question not raised in the state court below nor not actually decided by that court; that is, the Supreme Court is without jurisdiction to pass upon a contention as to state violation of federal Constitutional rights, or upon any federal question, where the record indicates that the issue was neither raised nor considered by the state courts. See *e.g. Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Ellis v. Dixon*, 349 U.S. 458 (1954); *Edelman v. California*, 344 U.S. 357 (1952); *Durley v. Mayo*, 351 U.S. 277 (1955); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334 (1959); *Hanson v. Denckla*, 357 U.S. 235 (1958); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154 (1945); *Wilson v. Cook*, 327 U.S. 474 (1945); *CIO v. McAdory*, 325 U.S. 472 (1944); *Hooker v. Los Angeles*, 188 U.S. 314 (1902); *Dewey v. Des Moines*, 173 U.S. 193 (1899); *Honeyman v. Hanan*, 300 U.S. 14 (1936). Moreover, this Supreme Court has consistently held that its jurisdiction to examine the final judgments of state courts cannot arise from inference or surmise but only from averments so distinct and positive as to place it beyond question that that party bringing the case up for review intended to assert a federal right in the state court. See *e.g. F. G. Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Levy v. Superior Ct.*, 167 U.S. 175 (1897); *Kipley v. Illinois*, 170 U.S. 182 (1897).

Rule 23(1)(f) of the Supreme Court Rules, recognizing the principles enunciated above, provides that where

review of the judgment of a state court is sought, the statement of the case contained in a petition for certiorari must specify the stage at which and the manner in which the federal questions sought to be reviewed were raised in the state courts, the method of raising them, and the way in which they were passed upon by the state courts, with such pertinent quotations of specific portions of the record as will show that the federal questions were timely and properly raised so as to give this Supreme Court jurisdiction to review the judgment.

It is evident that the statement of the case contained in the petition for certiorari filed herein does not comply with the requirements of Rule 23(1)(f). The various quotations taken from Petitioner's briefs and petitions for rehearing filed in the state appellate courts and set out in Petitioner's statement of the case do not give the slightest indication that the Petitioner raised the asserted federal question set out in the petition for certiorari, or raised the contention that the state appellate courts disregarded established principles of appellate review in violation of Petitioner's Fourteenth Amendment rights to due process of law or equal protection of the laws, or raised any other federal question for consideration by the state courts below. Certainly, there is a complete dearth of statements so distinct and positive as to place it beyond question that the Petitioner intended to assert a federal right in the state courts. Furthermore, there is no indication that the state courts below actually considered any federal question. This lack of compliance with Rule 23(1)(f) is not the result of an oversight on Petitioner's part, but results from the fact that Petitioner's contention that the state appellate courts violated his Fourteenth Amendment rights to due process of law and to the equal protection of the laws was never raised or considered in the state courts.

The trial court entered a final judgment in favor of the Petitioner, and no hint of any federal question appears in the trial court record (TC 1 - 178). It is equally clear that no federal question was presented to the District Court of Appeals, Third District of Florida. Neither the federal question asserted in the petition for certiorari pending herein nor any other federal question was presented by Respondents' assignments of error (TC 175), by Respondents' brief (AC 1 - 38) and reply brief (AC 53 - 71) of appellants or by Petitioner's brief of appellee (AC 39 - 52; P App. 9 - 22). On the contrary, the assignments of error and the briefs were strictly confined to issues of state law. Basically, Respondents, as appellants, contended in their briefs that the Petitioner, under Florida law, had failed to prove his affirmative defense of want of consideration for his promissory note given to Respondents by substantial competent evidence. On the other hand, Petitioner, as appellee, argued his brief that there was sufficient evidence under Florida law to support the judgment of the trial judge sitting as a trier of fact. None of the briefs made any reference to the Constitution of the United States, to any federal Constitutional rights, to Fourteenth Amendment rights of due process of law and equal protection of the laws, or to any other federal question.

It is also clear that no federal question was decided by the state district court of appeal. The most cursory examination of the decision of the district court of appeal (AC 72 - 79; P App. 23 - 32) reveals that there is no trace of a federal question and that the appellate court restricted itself to the question of whether there was substantial evidence to support the judgment of the trial court. As the appellate court stated:

"On this appeal from the judgment in favor of the defendant, the determinative question is whether there was substantial competent evidence to support the conclusion reached by the trial judge that the affirmative defense of want of consideration was established. Primarily it must be noted that on the issue created by that affirmative defense, notwithstanding its presentation in the case in the form of a sworn answer, the defendant had the burden of establishing the defense by a preponderance of the evidence. See Biro v. Geiser, Fla. 1967, 199 So.2d 461, so holding because of the existence and effect of Rule 1.110(d), RCP, 30 F.S.A.

In our view the trial court was in error in holding that the defendant successfully met that burden, and that want of consideration was established by a preponderance of the evidence —a necessary holding in granting judgment for the defendant." (AC 77, App. 30-31)

Nor did the petition for rehearing (AC 80-85; P App. 33-37) or the petition for certification of question as one involving a question of great public interest (AC 84; P App. 39), filed in the District Court of Appeal after that court reversed the trial court's judgment and instructed the trial court to enter judgment for Respondents, challenge the appellate court's decision as violative of Petitioner's Fourteenth Amendment rights or any other of his federal rights.

The petition for certification merely requested the District Court of Appeal to certify the cause to the Florida

Supreme Court under Article V § 2 of the Florida Constitution, providing for review by that court of cases certified as involving a question of great public interest, as one involving "important questions concerning the obligation of attorneys and the standards to be applied in asserting their rights as litigants in the trial and appellate courts of our state" (AC 84; P App. 39). The language of the petition for certification in no way intimates that the alleged questions "of great public interest" sought to be certified concerned any federal question.

The petition for rehearing contains no reference to any federal Constitutional rights, and it is apparent that the Petitioner's assertion that the appellate court's decision represented ". . . a complete and unique departure from virtually every established principle of appellate review. . . ." (AC 80; P App. 33) does not constitute a claim that the appellate court's decision violated any of Petitioner's federal Constitutional rights. It is also apparent that Petitioner's speculation that the appellate court ". . . concluded that the usual view as to the resolution of conflicting testimony by the finder of fact, and the role of the appellate court in reviewing such conclusions. . . ." (AC 83; P App. 36) was inapplicable because of the existence of an attorney-client relationship and Petitioner's assertion based upon said speculation that the appellate court had overlooked the cases holding that the existence of an attorney-client relationship does not affect the right of the trial judge to believe the attorney's testimony did not raise the claim presented in the petition for certiorari pending herein that the appellate court's decision violated Petitioner's federal Constitutional rights. In fact, it is clear that the petition for rehearing was grounded entirely in state law since there is no allusion to the federal Con-

stitution, the Fourteenth Amendment, or rights of due process of law and equal protection of the laws and since the only citations of authority were decisions of the state courts involving state principles of appellate review.

The Petitioner's petition for writ of certiorari to the District Court of Appeal, Third District, filed in the Supreme Court of Florida (SC Item 1, 1-5; P App. 43-48) presents essentially the same situation. In that petition for certiorari, the Petitioner sought to invoke the jurisdiction of the state supreme court under Article V, Section 4 of the Florida Constitution providing for review by certiorari of any decision of a district court of appeal that is in direct conflict with another district court of appeal or of the supreme court on the same point of law. In his petition for certiorari the Petitioner asserted "direct conflicts" with state court decisions on two points of law. First, the Petitioner claimed that the decision of the appellate court was in "direct conflict" with the decisions in *Chakford v. Strum*, 87 So.2d 419 (Fla., 1956) and *Lowrey v. Rosenberg*, 147 So.2d 321 (Fla., 1st D.C.A., 1962) holding that the decision of a trial judge, sitting as a finder of fact, must be affirmed if there is competent, substantial evidence, whether contradicted or not, to support it; and that an appellate court may not properly reassess the evidence or substitue its independent judgment concerning the creditability of witnesses for that of the trial judge (SC Item 1 4; P App. 46). Second, the Petitioner claimed that the appellate court decision, ". . . insofar as it concluded that the usual view as to resolution of conflicting testimony by the finder of fact, and the role of an appellate court in reviewing such conclusions does not apply because the transaction involved was one between an attorney and his client. . . ." was in "direct conflict" with the

decisions in *Davant v. Lambdin*, 135 Fla. 700, So.201 (1939) and *Philip v. Griffith*, 100 So.2d 197 (Fla., 2nd D.C.A., 1958) (SC Item 1 6-7; P App. 47). However, Petitioner did not assert, either expressly or by implication, that the decision of the appellate court violated his federal Constitutional right to due process of law and equal protection of the laws, and it is manifestly clear that the assertions of "direct conflict" with the cited state court decisions dealing with principles of state law did not present any federal question to the state supreme court.

Equally devoid of any federal question were the Petitioner's brief in support of the jurisdiction of the state supreme court to entertain his petition for certiorari (SC Item 2 1-10; P App. 49-58), Respondents' opposing brief (SC Item 41-23) and Petitioner's petition for rehearing filed in the state supreme court (SC Item 7 1-2; P App. 61-62). The Petitioner's brief merely presented expanded argument in support of his assertion that the lower appellate court decision was in "direct conflict" with other state court decisions. Respondents' brief simply rebutted Petitioner's assertions of "direct conflict" by demonstrating that the lower court had not applied any aberrant principles of appellate review but that its decision was entirely consistent with the state court decisions cited by the Petitioner and the principles of appellate review established in the state appellate courts. Moreover, the petition for rehearing submitted to the state supreme court simply repeated the assertions presented by Petitioner in his petition for certiorari and in his brief in support of jurisdiction. Obviously, no claim of any federal Constitutional right was raised, discussed or even mentioned in either of the briefs or in the petition for rehearing.

In sum, the record before this Supreme Court in the instant cause affirmatively indicates that no federal Constitutional right was ever claimed or specially set up by Petitioner in the state courts below, and it is firmly established that this Supreme Court will not decide federal Constitutional issues raised for the first time before it on review of state court decisions. See *e.g. Cardinale v. Louisiana*, 394 US 437 (1969) and cases cited therein.

CONCLUSION

The Respondents respectfully submit that the Petition For a Writ of Certiorari To The District Court of Appeal of Florida, Third District pending herein should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition has been furnished by United States Mail, on this 24 day of September, 1970 to HAROLD MENDELOW, c/o DAVID F. CERF, JR., 803 Biscayne Building, Miami, Florida 33130, Attorneys for Petitioner.

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1970

No. 625

ROBERT C. BIRMELIN,

Petitioner,

vs.

RAY BOYMER and MARY BOYMER, et al.,

Respondents.

PETITION FOR REHEARING

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No. 625

ROBERT C. BIRMELIN,

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Respondents.

PETITION FOR REHEARING

Petitioner, ROBERT C. BIRMELIN, prays that this Honorable and highest Court will entertain this Petition for Rehearing on the Court's Order entered November 23, 1970, and upon a prayerful consideration of the matter issue a Writ of Certiorari.

STATEMENT

This Court denied the Petition for Writ of Certiorari on November 23, 1970. The Petitioner asks for a reconsideration of the Petition as the denial of the Petition is a denial of basic federal constitutional protection to attorneys-at-law.

The issue is simple: Is an attorney entitled to the protection of due process and equal protection of the law in an appeal in the State Appellate Courts. The Respondents did not and the Petitioner submits they could not take issue with the merits of the Petition. The Petitioner was in fact denied due process and equal protection in his appeal.

Mr. Justice Black announced the judgment of this Court in *Griffin* v. *Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956). The *Griffin* opinion held that two convicts who were convicted of armed robbery were entitled to the protection of due process and equal protection in their State appeal. Why then is the Petitioner who is an attorney-at-law not so entitled? Equal protection not only applies to the poor and imprisoned, it also applies to the not poor and not imprisoned!

The Petitioner can only conclude that this Court denied his Petition on the grounds that his complaint about his deprivation of constitutional rights was not framed in the exact words that: "the Petitioner demands his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution." In answer to that argument, the Petitioner submits that this Court has never before held that there are any magic

words, magic phrases or other constitutional mumbo jumbo required to specially set forth a deprivation of due process and equal protection.

This Court quoted from an earlier opinion by Justice Harlan in *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 19 S.Ct. 97 (1898), and stated:

> " . . . . . no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted." (Id. 19 S.Ct. 100).

This Court has held that a Petitioner need not even cite the due process clause to invoke this Court's jurisdiction in *Braniff Airways* v. *Nebraska State Board of Eq. E. A.*, 347 U.S. 590, 174 S.Ct. 757:

> "Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." (Id. at 74 S.Ct. 763).

The Petitioner submits that based on the principles which this Court has laid down in prior decisions that he sufficiently set forth his federal claim and this Court does have jurisdiction in this case.

The Petitioner again refers the Court to Pages 6 to 9 of his Petition in which he complained to the State Court that he was not a second-class citizen before the Appellate Court and that identical rules of Appellate review apply to cases in which lawyers are involved. Surely, that is enough to set forth a claim for due process and equal protection of the laws.

CONCLUSION

For the foregoing reasons, this Petition for Rehearing should be granted and a Writ of Certiorari issued.

CERTIFICATE OF GOOD FAITH

This Petition for Rehearing is filed in good faith and restricted to grounds set forth in Rule 58(2).

CERTIFICATE OF SERVICE

I, HAROLD MENDELOW, c o DAVID F. CERF, JR., 803 Biscayne Building, Miami, Florida 33130, DO HEREBY CERTIFY that a copy of the foregoing PETITION FOR REHEARING was mailed to HENDRICKS & HENDRICKS, Attorneys for Respondents, 1441 S. W. First Street, Miami, Florida, this 17th day of December, 1970, by mailing them a copy in a duly addressed envelope postage prepaid U. S. mail.

/s/ HAROLD MENDELOW

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